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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-659

MAX OFFENBERG and MARIE OFFENBERG, husband and wife,

Petitioners,

vs.

THE STATE OF CALIFORNIA; THE COUNTY OF SAN BERNARDINO; G. LEON GREGORY, Tax Collector of the County of San Bernardino; ORVILLE K. DOYLE and LEONA M. DOYLE, husband and wife,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

STANFORD D. HERLICK, County Counsel
By Robert R. Walker, Deputy County Counsel
County Civic BuildingEast
157 West Fifth Street, 2nd Floor
San Bernardino, CA 92415

Attorneys for Respondents, County of San Bernardino and G. Leon Gregory, Tax Collector of the County of San Bernardino.

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The opening paragraph of petitioners' brief includes two serious misstatements which do not put this matter in its proper perspective.

FIRST, the following phrase on page 1 of petitioners' brief is misleading: "*notice* to a *property owner* (of the government's intention to sell *his* property for taxes)." That statement is

incorrect because the record is clear that the property in question in this litigation had been deeded to the State of California on July 3, 1969 and, therefore, Petitioners' were not the owners of, and did not have title to the property in question when the "notice" [of the sale at public auction] referred to by petitioners was given.

SECOND, in the same paragraph, Petitioners refer to "a known incorrect address" and "knowledge of the property owner's correct address." As to such "knowledge" the California Appellate Court stated: "The notation [of a former address of petitioners] did not constitute any better evidence than the tax collector already had on hand for purposes of the mailed notice."

Petitioners desire to impute their knowledge to the Tax Collector's office, although for seven years they never notified the Tax Collector's office as to what their correct address was, and never paid any taxes on the property in question during that period of time.

Preliminary Statement

Contrary to petitioners' Preliminary Statement, this case is not involved with "the government's power to divest a citizen of his title to property" but the central issue is related to the *statutory requirements* of notice imposed by the State legislature when property, which has already been deeded to the State for delinquent taxes, is to be sold at public auction. The complaint and the record show that no issue was raised as regards the deed to the State.

It is, therefore, respectfully submitted that the central issue is concerned with *statutory due process* and *not Federal Constitutional Due Process.*

Grounds for Denying Petition

Inasmuch as the central issue relates to statutory due process, rather than Federal Constitutional Due Process, the grounds for the petition are not present.

Question Presented for Review

These respondents disagree with the wording of petitioners' brief in the above - entitled section [Pet. Brief, p. 2] because it refers to the property as still owned by the petitioners, rather than the State, when it was sold at public auction. The fact is that title and ownership were held by the State when the procedural steps were taken for the sale of the tax delinquent property at public auction.

The question to be factually correct should read:

Did the government illegally deprive petitioners of their *former* property, which had already been deeded to the State, and deny them due process of law, when it sold *said* property for delinquent taxes after complying with the statutory requirements as to notice?

Supplementation to Statement of the Case

The "Statement of the Case" as set forth in petitioners' brief is not correct because of omissions which are crucial to a full understanding of the factual situation.

On page 4 of petitioners' brief is the following statement:

"Petitioners were totally unaware of the county's error in transcribing an incorrect address on the assessment records in 1963 and the years thereafter and, thus, were not in a position to call the error to the attention of county officials."

Petitioners may not have known the reason why they did not receive tax bills, but they knew they were not receiving them.

The evidence is clear in this case that Mrs. Offenberg knew the tax situation in respect to the property which was sold at public auction because on February 5, 1970, the day after she learned of the sale, she made the following admission to the following question: [R. Tr. p. 137, 1.20-1.13]

"Q. And didn't you also say that 'I have never been assessed and I never received a tax bill?'

"A. That's right, sir. I didn't receive a tax bill. I did not receive a tax bill."

In addition Mrs. Offenberg filed an address change card on December 8, 1969, for another piece of property but made no attempt to investigate the facts regarding the property which is the subject of this lawsuit. [R. Tr. p. 117, 1.18-22; Exhibit A-D]

Dr. Offenberg knew that he would get assessed, but relied on his auditors to "take care of all taxes and so forth." [R. Tr. p. 119, 1.11]

In view of that testimony, it is incomprehensible to think that the auditors would not be aware of the tax situation, particularly at income tax time when the auditors would be searching for every possible deduction. It is also incomprehensible to understand how having found the nonpayment of the property tax, that the auditors would not have alerted Dr. Offenberg.

Petitioners persist in trying to attribute their knowledge of a "correct" address to the Tax Collector's office. But the California Court of Appeal would not, and did not, buy this argument as evidenced on page 5 of Appendix A in petitioners' brief herein:

"According to the evidence, the tax collector processed the sale routinely, and *did not know whether the Los Angeles address was a correct address or not.* This fact would only have been determined by further investigation, which duty the Legislature has not imposed upon the tax collector. The

"courtesy notice" was nothing more than the name implies, that is, a voluntary extra effort on the part of the tax collector for the benefit of the delinquent taxpayer. The statutory scheme places the burden on the tax collector to ascertain the address of the last assessee of the tax - deeded property sought to be sold by "an examination . . . made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll." (Rev. & Tax Code, Sec. 3701.) The assessment of the mountain cabin parcel on the 1963 - 1969 rolls placed in evidence gives the Yuma address for appellants, *Notice given to the Yuma address by registered mail constituted full compliance with the law."* (Emphasis added.)

Petitioners' brief herein on page 5 states:

"Published notice of the sale in the newspaper published at the county seat likewise proved defective because of an error in the description of the property to be sold."

The California Court of Appeal said the following after examination of the facts (Appendix A to Petitioners' Brief, p. 6):

". . . the record has been examined and it reveals that the mountain cabin parcel was correctly described in all notices given."

Federal Constitutional Due Process is Not an Issue

A. Validity of Deed to the State of California is Conclusive.

Petitioners' complaint in this case did not challenge the deed to the State of California which occurred because the property had been tax delinquent for five years. That deed was executed on July 3, 1969 and recorded with the San Bernardino County Recorder on August 12, 1969. Furthermore there is no evidence in the record challenging the deed to the State.

Therefore, since a full year passed after the deed to the State of California, it is clear the deed to the State is conclusively presumed to be valid under the provisions of California Revenue and Tax Code, Section 175.

The Supreme Court of the State of California commented on the above cited statute as follows in the case of *Sears v. County of Calaveras* (1955) 45 C 2d 518, at p. 522; 289 P 2d 425:

> "The improper creation of the tax lien and recordation of the deed to the state do more than merely give rise to a permissible cause of action in favor of the land-owner. They also start the running of the *special statute of limitations* applicable to such an owner. [Cal. Rev. and Taxation Code Sections 175 and 3521]. If he does not move to protect his rights as against the tax by payment, redemption, or timely and successful attack upon the tax deed or the proceedings leading up to it, he is divested of his title. *After the statutory period has run the tax deed transfers the title by operation of law from the owner of the property to the state the same in effect as a voluntary grant.*" (Emphasis added.)

B. Legal Characteristics of Property Tax - Deeded to the State.

In order to put the present case in proper perspective it is important to have a clear understanding of the *legal characteristics of property tax - deeded to the state.*

A leading case in this regard is *Mercury Herald Co. v. Moore* (1943) 22 Cal. 2d 269; 138 p. 2d 673. At page 272 of the opinion Justice Traynor said:

> "It is also contended that the right to redeem after the property has been deeded to the state but before it has been sold by the state is a property right, and that the legislation in question deprives the property owner of that right without due process of law. *This contention takes no account of the distinction between the absolute right to redeem within the fixed period of five years from the date of sale to the state, and the conditional right to redeem once the property has been deeded to the state if the state does not sell the property.* The deed to the state upon the expiration of the five-year period conveyed absolute title to the property free of any encumbrance except liens for certain taxes. (Political Code, §3787; R. & T. Code §3520) *Upon execution of the deed the property owner forfeited all rights in the property except the privilege of redeeming it at any time before the state disposed of it.* (Various cases) *The property owner thereafter had at most an offer enabling him to regain title to the property, which could be revoked by the state at any time before acceptance.*" (Emphasis added.)

In respect to redeeming tax - deeded property from the state, Justice Traynor made the following statement in *Peterson v. Johnson* (1952) 39 C 2d 745; 249 P2d 17; at page 748:

> "If the property is thereafter sold to the state for nonpayment of the tax, it can be redeemed only upon the terms prescribed by the Legislature. *'There is no*

constitutional right to redeem property that has been sold to the state for the nonpayment of taxes. "The right of redemption comes entirely from the statute, and is subject to all the limitations and conditions therein imposed." (Quinn v. Kenney, 47 Cal. 147, 150.)' (*Sutter - Yuba Inv. Co. v. Waste,* 21 Cal 2d 781, 785 [136P.2d 11].)" (Emphasis added.)

In the light of the above statement saying " 'The right of redemption [of tax - deeded property] comes entirely from the statute, . . .' " the following statement from Justice Carter, in a concurring opinion in the *Mercury - Herald Co. v. Moore* case, supra, at page 281 merits the most serious consideration in this case:

"It appears to be well settled in this state that the right to recovery upon a purely statutory right can be impaired or abrogated without violation of any right guaranteed by the state or federal Constitutions." [Various cases cited.]

Therefore, in the present case, since the defendant County and its Tax Collector adhered to the statutory provisions imposed by the Legislature in disposing of tax - deeded property, all the legal requirements have been satisfied, and no due process rights were abridged. This conclusion is reinforced by the case of *Litchfield v. County of Marin* (1955) 130 C. A. 2d 806; 280 P2d 117; wherein it is stated at the bottom of page 816:

"It [notice of sale *by the state* and not notice of transfer of title by *deed to the state**] is not therefore jurisdictional in nature for *after title has passed to the state and right of redemption terminated [leaving only a privilege of redemption*] the state may without violating any rights of*

due process sell the property with or without notice to any individual property owner by simply complying with legislative requirements. (*Mercury Herald Co. v. Moore*, 22 Cal. 2d 269 [138 P. 2d 673, 147 A. L. R. 1111]; *Jacoby v. Wolff*, 198 Cal. 667 [247 P. 195]; *City of Compton v. Boland*, supra, 26 Cal. 2d 310.)"

*Inserted to clarify meaning. (Emphasis added.)

C. Statutory Notice Requirements as to Mailed Notice.

Cal. Rev. and Tax. Code Section 3701 sets forth the requirements as to notice by mail for the sale at public auction of property which had previously been deeded to the state for delinquent taxes, as follows:

"After receiving the written authorization of the Controller and not less than 21 nor more than 28 days before the proposed sale, the tax collector shall send notice by registered mail of the intended sale to the last assessee of each portion of the property at his last known address. *To ascertain the address of the last assessee of the tax - deeded property an examination shall be made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll.*" (Emphasis added.)

D. Statutory Notice Requirements were Achieved.

As to petitioners' arguments in respect to published notice, the California Court of Appeal, Fourth Appellate District, Division Two, disposed of that contention as follows (Appendix A, p. 6 of petitioners' Petition for the Writ of Certiorari):

"Appellant argues that the published notice was defective. No issue was raised in the pleadings in this regard. Nevertheless the record has been examined and it reveals that the mountain cabin parcel was correctly described in all

notices given. . . . Using appellants' own cited standard, "the object of the statute is to notify the owner that the taxes thereon are delinquent . . . and the description of the lot must be sufficient to give such notice." The purpose of the statutory notice concerning the mountain cabin parcel was thus achieved."

E. Substantial Evidence Indicates These Respondents Fully Complied with Notice Requirements.

The California Court of Appeal, Fourth Appellate District Division Two, succinctly summarized the question as to notice as follows (Appendix A, p. 4, of petitioners' Petition for the Writ of Certiorari):

"To begin, the deed to the state transfers title to the state the same in effect as a voluntary grant (*Sears v. County of Calaveras,* 45 Cal. 2d 518, 522), leaving the former owner with a statutory right of redemption only (Rev. & Tax. Code, §4101). On completion of the sale after the deed to the state, the right of redemption is terminated (Rev. & Tax. Code, §3707). There is no constitutional right of redemption, which comes entirely from the statute and is subject to all the limitations and conditions therein imposed (*Peterson v. Johnson,* 39 Cal. 2d 725, 748). The Legislature might have adopted a scheme of disposing of tax - deeded property without notice given to the delinquent taxpayer of intention to do so (*Smith v. Furlong,* 160 Cal. 522, 529). As it is the statute does require notice both by mail and by publication. There was substantial evidence that the requirements of the statute concerning notice were fully complied with."

F. United States Supreme Court Cases

(1) Collection of Public Revenue is not governed by Judicial Due Process Principles.

Cincinnati, N.O. & T.P.R. Co. v. Kentucky (1885) 115 U.S. 321; 6 S. Ct. 57; 29 L. Ed. 414.

115 U. S. p. 331:

"It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial; and that "due process of law," as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals."

(2) Summary Remedies May be Used in the Collection of Taxes.

King v. Mullins (1898) 171 U. S. 404; 18 S. Ct. 945; 43 L. Ed. 214.

171 U. S. p 429:

". . . If this be true it would seem to follow necessarily that if the statutes of the state, in connection with the Constitution, gave the taxpayer reasonable opportunity to protect his lands against forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law.

"Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature apply equally to proceedings for the collection of public revenue by

taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character."

(3) California Statutory Procedure Approved.

Chapman v. Zobelein (1915) 237 U. S. 135; 35 S. Ct. 518; 59 L. Ed. 874.

237 U. S. p 136:

"The laws of California provide a means by which the owner of property can be heard before the board of equalizers as to the fairness of the tax assessment. If no objection is made and the taxes are not paid a delinquent list is published. If default still continues, the property, instead of being offered to the highest bidder, is sold to the state, which holds the "absolute title as of the date of the expiration of five years from the time of the sale." During that period the owner has the right to redeem by paying the original and accrued taxes, penalties, and interest. It is, however, not the policy of the state to retain separate parcels of land; and if the owner does not redeem within the five years, and if the state has not otherwise disposed of the same, the statute provides that the land, or so much thereof as the comptroller may think necessary, shall, after public advertisement and notice to the owner, be sold to the highest bidder."

237 U. S. p 139:

"The plaintiff's contention must be limited to a consideration of the attack on the proceedings in which his lot was sold in 1905. And, without undertaking to consider the essentials of a valid forfeiture of property for nonpayment of taxes, it is sufficient to say that, in the

present case, the statute gave an opportunity to be heard as to the fairness of the original assessment. It gave notice of the time and place at which the property would be sold to the state, subject to the owner's right to redeem during a period of five years. Under the California decisions the first sale, at the end of five years, vested the state with the title. King v. Mullins, 171 U. S. 417, 436, 43 L. ed. 219, 226, 18 Sup. Ct. Rep. 925. See also 2 Cooley, Taxn. 3d ed. 862. The present case is even stronger, for this is a bill attacking the title of the purchaser who bought at the second sale, after notice had been given to the owner, by publication and mail, of the time and place when it would occur – his right to redeem continuing up to the time the state actually entered or sold. Santa Barbara County v. Savings & L. Soc. 137 Cal. 463, 70 Pac. 457. Certainly such a sale, after the finding by the comptroller of the amount of taxes due, and after public and special notice to the owner, would "work the investment of the title through the public act of the government. ... The sale was the public act which is equivalent to office found." King v. Mullins, supra. That case shows that the defendant was not deprived of his property without due process of law, in violation of the 14th Amendment. All other questions raised by the record are concluded by the decision of the state court. The judgment of the Supreme Court of California is affirmed."

Conclusion

In petitioners' Conclusion (p. 22 of petitioners' brief) the following statement is set forth:

> "Only the State of California had the courage to recognize the gross injustice of what had occurred and true to its convictions it filed a disclaimer in favor of petitioners."

It is correct that the State of California filed a disclaimer in this case, but there is not one shred of evidence in the record as to the reason why the State of California filed the disclaimer.

The evidence shows that the County officials meticulously followed the required statutory procedures, and that they did not have actual knowledge of the "correct" mailing address of petitioners. A review of the evidence moved the California Court of Appeal to say (p. 4, Appendix A, petitioners' brief): "the record permits the inference that appellants failed to pay the taxes because they believed that the property had escaped assessment." The law is clear that there is no issue of Federal Constitutional Due Process in this case.

Wherefore, respondents pray that the application for writ of certiorari be denied.

Dated: San Bernardino, California
November 24, 1972

Respectfully submitted,
STANFORD D. HERLICK
County Counsel of the
County of San Bernardino

By Robert R. Walker
Deputy County Counsel of the
County of San Bernardino

Attorneys for Respondents, County of San Bernardino and G. Leon Gregory, Tax Collector of the County of San Bernardino.

PROOF OF SERVICE

I, Robert Ross Walker, a Deputy County Counsel for the County of San Bernardino, State of California, a member of the bar of the Supreme Court of the United States, hereby certify that, on the 24th day of November, 1972, I served copies of the foregoing "Brief in Opposition to Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Two" on the several parties thereto as follows:

1) On Max Offenberg and Marie Offenberg, husband and wife, Petitioners, by mailing copies in a duly addressed envelope, first class postage prepaid, to their attorneys as follows:

Mike Mayo, Esquire
111 South Garfield Avenue
Montebello, CA 90640
Attorney for Petitioners (3 copies)

John D. Cahill, Esquire
c/o Simon, Sheridan, Murphy, Thornton
and Modvene
533 Fremont Avenue, Suite 720
Los Angeles, CA 90017
"Of Counsel" for Petitioners (3 copies)

2) On the State of California, Defendant and Respondent, which filed a Disclaimer, by mailing copies in a duly addressed envelope, with air mail postage prepaid, to its attorneys, as follows:

Evelle V. Younger, Attorney General
of the State of California
Ernest P. Goodman, Assistant Attorney General
of the State of California
Edward P. Hollingshead, Deputy Attorney General
of the State of California
500 Wells Fargo Bank Building
Fifth Street and Capitol Mall
Sacramento, CA 95814

Attorneys for disclaiming
Defendant and Respondent,
The State of California (3 copies)

3) On Orville K. Doyle and Leona M. Doyle, husband and wife, Defendants and Respondents, by mailing copies in a duly addressed envelope, first class postage prepaid, to their attorney, as follows:

Robert S. Morris, Esquire
c/o Fullerton and Morris
472 North Arrowhead Avenue
San Bernardino, CA 92401 (3 copies)

It is further certified that all parties required to be served have been served.

Robert Ross Walker

Address:
Robert Ross Walker
Deputy County Counsel
County of San Bernardino
County Civic Building East
157 West Fifth Street, 2nd Floor
San Bernardino, CA 92415